UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

INSTITUTO SOCIO ECONOMICO, INC.

and

Cases 24-CA-11762 24-CA-11880

UNIDAD LABORAL DE ENFERMERAS(OS) Y EMPLEADOS DE LA SALUD

ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION

Ayesha K. Villegas Estrada Counsel for Acting General Counsel

National Labor Relations Board, Region 24 La Torre de Plaza, Suite 1002 525 F.D. Roosevelt Ave. San Juan, P.R. 00918-1002 Telephone: (787) 766-5347

Facsimile: (787) 766-5478

Email: ayesha.villegas-estrada@nlrb.gov

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Counsel) and very respectfully submits before the Honorable Board, Acting General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge Decision (herein ALJD), as follows:

I. PROCEDURAL STATEMENT

The Regional Director for the 24th Region of the National Labor Relations Board issued an Order Consolidating Cases, Second Consolidated Amended Complaint and Notice of Hearing on February 29, 2012, based on charges filed by Unidad Laboral de Enfermeras(os) y Empleados de la Salud ("Union") against Instituto Socio Económico

Comunitario, Inc., ("Respondent") in Cases 24-CA-11762 and 24-CA-11880. The only remaining allegation tried before the ALJ was whether Respondent violated Sections 8(a)(1) and (5) of the Act by unilaterally and without notice to the Union and/or affording the Union and opportunity to bargain to impasse requiring unit employees to take vacation leave during periods not requested by its unit employees. The hearing on this matter was held before Administrative Law Judge William N. Cates on May 26, 2012, in San Juan, Puerto Rico. After the parties filed their respective post hearing briefs, the ALJ issued its decision on August 1, 2012, finding that Respondent had unilaterally required unit employees to take vacation leave during periods they did not requested, without giving the Union prior notice and an opportunity to bargain. On September 14, 2012, Respondent filed exceptions to the Administrative Law Judge's decision and a legal brief in support of its exceptions.

II. EXCEPTION A

Respondent excepts to the ALJ's finding that Respondent forced its units unit employees to take vacations during period not requested by them. Essentially, Respondent contents the ALJ's failed to take into consideration the documental and testimonial evidence presented during the trial.

The ALJ found that during the hearing Union official Arturo Grant credibly testified that during the month of February 2011, he received complaints from several unit employees that Respondent was obligating them to use up all of their accrued vacation before Holy Week in April 2011. (ALJD at p 4; Tr p 55 ln 11-15) As a result of

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¹ On the day of the hearing the parties reached a non-Board settlement regarding certain allegations of the Consolidated Complaint which was amended only with regard to the unilateral decision to compel employees to use vacation time. (Tr. p 24-27)

the complaints he received, he sent a letter on February 25, 2011, to Respondent's counsel stating that employees had informed the Union that they were being given instructions by management that they had to use their excess vacation time accrued in excess of 7 days before the month of April of that year. (ALJD at p. 4; GC Ex. 7, Tr. p 40 In 9-20) In its letter, the Union requested Respondent to cease and desist from such practice; as such requirement contravened the parties' collective bargaining agreement. The Union requested that it subsequently notify the Union of any steps undertaken by Respondent to cease this practice. (GC Ex. 7; Tr. p. 40 In. 9-20) Respondent denied the Union's allegations by letter dated March 1, 2011, and argued that it was merely requesting employees to coordinate their vacation leave. (GC Ex. 20; Tr. P. 42 In. 13-15) Subsequently, it is undisputed that the parties held a meeting on March 8th in which the Union once again contended that Respondent was obligating employees to use their accrued vacations balances by the Holy Week in April 2011. (ALJD at p 4; GC Ex.9; Tr. pp 47-48) This meeting was held between Respondent's counsel and it's Human Resources Director Iris Lopez. During the meeting Respondent maintained its position that it was merely helping employees coordinate their vacations, but according to Grant, the information that he had was that Ms. Guilliani was giving instructions to employees to take their vacations. (ALJD at p 4; Tr. pp. 47-48, 52) After the meeting Union official Grant sent Respondent yet another letter dated March 10, 2011, arguing that Respondent was not merely attempting to coordinate vacations from employees but soliciting employees to submit requests for vacation leave for days they had not intended to request. (ALJD at p 4; GC Ex 9) Attached to Grant's letter was a copy of an email from Thayda Munera, Human Resources specialist, soliciting employees to

request leave for vacations. Id. In her email Munera indicated that employees Ivis Cortes, Gladys Gonzalez and Yolanda Soto, had to program 4, 2 and 5 days of annual leave, respectively. Id. Union official Grant again raised the issue about the employees collective complaint that Respondent was obligating them to take vacation time by letter dated April 7, 2011. (ALJD at p 4; GC Ex. 11) Respondent never responded to the Union's letter.

In spite of Grant's efforts to have Respondent cease obligating employees to take vacations at times they have not requested, Respondent admittedly closed its operations during the week of April 18 through April 22, Holy Week (ALJD at p 5; Tr pp 50 ln 8-12; 71 ln 5-7) and employees were charged vacations from Monday through Thursday. (Tr p 71 ln 8-10) It is undisputed that this was the first time that Respondent had closed all of its operations during the Holy Week. (Tr p 89 ln 17-22). In the past, Respondent always left an office open for those employees who elected to report to work. Respondent's Executive Director Yolanda Velez alleged during the hearing that Respondent closed all of its operations from April 18 through April 22 because no employee requested to work during that week but also explained that prior to Holy Week the company's vacation plan showed an excess of accrued vacation leave by employees and supervisors had been instructed to work on the vacation plan. (ALJD at p 6; Tr pp 92-93) Without a doubt Ms. Velez instructions to supervisors for them to work to have employees use the excess vacations.

Subsequently, in an email dated June 22, 2011, Operations Manager Guilliani gave specific instructions that "vacations should be contemplated on or before

September 30, 2011. Vacation plan is incomplete there are employees missing to comply." (ALJD at p 5; GC Exh. 25; Tr. p 77 ln 3-7)

In a letter dated August 2, Mr. Grant wrote again to Respondent's counsel complaining that Ms. Guilliani had given direct instructions to employees that they had to exhaust their accrued vacation leave and that employees were being forced to take vacations at times they did not want to take vacations. (ALJD at p 5; GC Exh 12) Mr. Grant requested that the vacation time that the employees had been forced to use be restored to them. Id. Mr. Grant mentioned in his letter that he had a meeting on July 26 with Respondent's counsel to discuss this issue about Respondent's insistence that employees exhaust all their vacation balances before the end of September 2011. (GC Exh 12) Respondent did not respond to the Union's letter.

Again, notwithstanding the Union's request to Respondent to cease obligating employees to take vacation leave during periods not requested by the employees, the documentary evidence showed that Respondent continued to force employees to take vacations.

In an email dated August 9, 2011, Human Resources Director Iris López instructed Human Resources Assistant Claudette Sanchez to program the vacation balances, for the employees listed in the email. (ALJD at p 5; GC Exh 26) This email, the subject of which was "program additional days vacation leave (extensions)" was sent with a high level of importance. (GC Exh 26) Sanchez was also instructed to find out whether the vacations balances had already been scheduled and about the status of the individuals who still had any balances. (ALJD at p 5; GC Exh 26) In the case of unit

employee Rafael Torres, López wrote that he had requested 14 days of vacations but that he still had a balance of 8 days which he had to schedule as soon as he returned from vacation and submit a request. Id. Unit employee Yolanda Soto had 1 day of vacation balance and to that effect, López indicated that her vacations had been extended until August 18 at 9am. Id. As to Wanda Toro, López indicated that she had a balance of 5.73 days, her vacation time was being extended and that she was to report to work from 8 am until 10:30 am, and then she was going to be charged vacation time for the rest of the day. Id. According to this email, Toro was notified of Respondent's decision. Id. In addition, Lopez indicates in her email that employee Juan Rios "has to take vacation at the end of sick leave," "must take vacation at the end of sick leave." (GC Exh 26) This email clearly demonstrates that the Employer was unilaterally extending employee's vacations unilaterally forcing them to use their vacation balance.

Perhaps the most compelling evidence to demonstrate that Respondent was forcing its employees to go on vacation, even if they did not want to, was the case of employee Ronny Paoli. The documentary evidence showed that he had submitted his request for vacation on March 1, 2011, for March 3 and 4; March 18; and April 20-21, respectively. (ALJD at p 6; GC Ex. 16, 17, 18) He also submitted a vacation request on June 22, 2011, to take vacations from July 18 through July 22, due to report back on July 26. (ALJD at p 6; GC Ex. 19) Notwithstanding Paoli's request to voluntarily take vacations, the week after he returned from his July vacation, he was told to go back on vacation on August 1, 2011, similar to the above-mentioned case of Rafael Torres. (ALJD at p 6; GC Ex. 15) It is undisputed that Paoli refused to go on vacation as required. Id. Consequently, because Mr. Paoli refused to go on vacation as required.

his direct supervisor, he was issued a disciplinary action. Id. In fact, Human Resources Director Lopez admitted that on August 4, 2011, Paoli was issued a disciplinary warning after he showed up to work and refused to go on vacation as instructed by his direct supervisor Zulma Rivera. (ALJD at p 6; Tr. p 64) In the disciplinary warning Respondent threatened Paoli with discharge if he refused to go on vacation. (GC Exh 15)

Contrary to Respondent's allegations, the evidence previously discussed submitted into evidence by the General Counsel, and relied upon by the ALJ, supports the ALJ's finding that Respondent was obligating employees to go on vacations and use all of their vacations balance. In this regard, the evidence clearly showed that Respondent, for the first time, closed all of its facilities during the week of April 18 through April 22 (Holy Week) and employees were charged vacation for all days during that week except Friday, which was a holiday recognized by the collective bargaining agreement between the parties.

Furthermore, although Respondent alleges that it acted according to past practice of "encouraging" its employees to "coordinate" their its vacation leave, it provided no single piece of documentary evidence that in the past it had "coordinated" employees vacations, as alleged. The only evidence to that effect was the unsupported self serving testimony of Respondent's officials that they were acting according to "past practice." On the contrary, the only document submitted into evidence by Respondent during the hearing, in support of its contention, was Art. XXXIII of the expired collective bargaining agreement between the parties. However, the expired collective bargaining agreement between the parties only provides for a suspension of Respondent's operations and mandatory vacation during the last week of December and the first week

of January. The suspension of Respondent's operations during the Holy Week and the compulsory use of vacation time during that period is not contemplated by the collective bargaining agreement. Respondent's appears to have forgotten that it is settled law that contractual reservations of managerial discretion does not survive the expiration of the contract embodying it. *E.I Dupont De Nemours, Lousiville Works*, 355 NLRB No. 176 slip op at pg 2-3 (August 27, 2010). In any event, Respondent did not submit any evidence to show that it had declared any of the days within the week of April 18 through April 22 as holidays. Instead, Respondent closed operations for an entire week. As previously stated, the collective bargaining agreement only contemplates such closing of operations during a week in December and a week in January.

Inexplicably, Respondent claims that the only reason it closed operations during that week was because employees did not ask Respondent for work. Thus, Respondent appears to contend that its operations depend on its employees' willingness to work. Further, this extrapolates that it was incumbent upon the General Counsel to initially prove that employees wanted to work during the Holy Week and then prove that employees that wanted to work were forced to take vacation. Without a doubt the documentary evidence and testimonial evidence submitted into evidence showed that Respondent deviated from its past practice of maintaining an office open during the Holy Week for those employees who would rather work instead of taking vacations. Furthermore, the evidence demonstrated that during the months prior to Holy Week Respondent was already giving instructions to employees that they needed to exhaust their vacations. In this regard, Respondent's Executive Director Velez

testified that before the Holy Week the vacations plan showed that there was an excess of accrued vacations, that supervisors had been notified of that problem that that they could work on they would work on the vacation plan prior to the Holy Week. Thus, confirming what Mr. Grant had raised to Respondent in its letters and meeting, it is cler that employees were being told that they needed to exhaust their vacations.

Respondent also argues that under the collective bargaining agreement employees were obligated to take annual leave by September 30. However, nowhere in the collective bargaining agreement does it provide that employees have to use all of their accrued vacation by September 30 of each year. If Respondent really intended to compel employees to take all of their accrued vacations by September 30 it would have clearly bargained so that the contract would so state. The collective bargaining agreement also fails to state that vacations had to be taken prior to September as Respondent's argues. Furthermore, the evidence demonstrates that Respondent has never before compelled employees to use their balance by September 30. In fact, the testimony of all of Respondent's officials during the hearing was precisely the opposite. All collectively denied that they were compelling employees to use their vacations by September 30 and reciting that they were simply attempting to help employees coordinate their vacations. Although Respondent argues that it acted as in the past and trying to help employees coordinate their vacations, Respondent did not provide any supporting evidence to demonstrate its alleged past practice.

The evidence as a whole demonstrated and the ALJ correctly concluded that Respondent closed its operations during the week of April18 through April 22, charging those days to vacations, except for Friday. The evidence further demonstrated that

after April 2011 the Employer continued to instruct employees that they had to exhaust their accrued vacation balance by September 2011, and employees were obligated to use their vacations subject to the issuance of disciplinary actions if they refused to comply with Respondent's instructions. The evidence also demonstrated that Respondent never notified the Union's about its decision to force employees to use their vacations balances and did not bargain with the Union about this matter. In this regard, it is well established that an employer violates Section 8(a)(5) of the Act if it makes a material unilateral changes on matters that are mandatory subject of bargaining. NLRB v Katz, 369 US 736 (1962). Vacations and vacation pay is clearly a mandatory subject of bargaining. See Robbins Door & Sash Co., 260 NLRB 659 (1982). Additionally, the Board had held that vacation scheduling constitutes a subject of mandatory bargaining. Migali Industries, 285 NLRB 820, 825-826 (1987); Migali Industries, 285 NLRB 820, 825-826 (1987); see also Blue Circle Cement Co., 319 NLRB 954, 960 (1995) (where "the Company's new restriction on its plant employees' freedom to schedule vacations was a substantial change affecting a condition of employment.") and Beverly Health & Rehabilitation Services, 335 NLRB 635, 636-637 (2001) (where the employer relied on the management-rights clause contained in expired collective bargaining agreement for making changes in vacation scheduling, among other changes) In sum, issues pertaining to vacations and holidays relate to the employees working conditions and are considered mandatory subjects under the Act. Waxie Sanitary Supply, 337 NLRB 303 (2001). Thus, having established that Respondent obligated employees to schedule their vacations and use their accrued balances at times they had not voluntarily elected to use them, Respondent implemented a change in vacations leave, a mandatory

subject of bargaining, without prior notification and bargaining with the Union such action constitutes a violation of Section 8(a)(5) of the Act.

III. EXCEPTION B

Respondent on brief argues that the ALJ erred in discrediting its witnesses' testimony by relying solely on the testimony of Union official Arturo Grant, which Respondent alleges is hearsay testiony. Contrary to Respondent's allegations, the ALJ did not relied "solely" on Mr. Grant's testimony to reach its findings. The ALJ in its decision discussed the documentary evidence submitted during the hearing, to wit, letters, emails and portions of the collective bargaining agreement. In the present case Mr. Grant testified that around February he began receiving complaints from employees that Respondent was forcing them to take vacations. Upon receiving those complaints, Mr. Grant acted consistent with those complaints and it is undisputed evidence that he wrote a total of four letters to Respondent between February and August 2011 about that issue and held at least one meeting with Respondent regarding the complaints. (GC Exhibit 7, 9, 11 and 12) At no time did Respondent deny having communications with employees regarding their scheduling of vacations in response to Mr. Grant's letters. Respondent merely tried to argue that it had only asked from employees to coordinate their vacations. (GC Exh 20, Tr. p 48 In 10-14) Mr. Grant's testimony is supported by competent evidence.

Furthermore, contrary to Respondent's contentions, the emails from Respondent's officials submitted into evidence does lead to the inescapable conclusion that employees were being forced to take vacations by Respondent. Operations

Manager Guilliani's statement in her June 22 email that "vacations should be contemplated on or before September 30, 2011, and [v]acation plan is incomplete there are employees missing to comply" leads to no other conclusion. (GC Exh. 25; Tr. p 77 In 3-7) Similarly, Ms. Lopez's August 9 email indicating that Ms. Yolanda Soto's vacations had been extended; that Wanda Toro's vacations had been extended and that she had been notified of Respondent's decision; and that employee Juan Rios had and must take vacation at the end of his sick leave Unit employee unmistakably demonstrate that Respondent was forcing employees to take vacations even if the employees had not requested or did not plan to take vacations. (GC Exh 26)

Finally, without a doubt, the disciplinary action issued to Mr. Paoli admittedly for refusing to go on vacation on August 4 demonstrates that employees were forced to take vacations at times they did not wish to take vacations subject to disciplinary action. (Tr p 64; GC Exh 15)

Contrary to Grant's credible testimony, which was supported by his actions and letters to Respondent, Operations Manager Guilliani was not reliable and was definitely no supported by documentary evidence. In this regard, to questions from the General Counsel as to whether employees were required to submit their vacations requests contemplating all their vacation balance by September 30, Operations Manager Guilliani specifically denied on the stand knowing any information about that matter. (Tr. p 71 ln 17-21) Notwithstanding her denial, the documentary evidence proved that, contrary to her own statements, she had knowledge that employees were being required to use of all of their vacation time by the end of September 2011. In fact, the documentary evidence not only show that she had knowledge, but that she gave specific instructions

in an email dated June 22, 2011, that "vacations should be contemplated on or before September 30, 2011. Vacation plan is incomplete there are employees missing to comply." (GC Exh. 25; Tr. p 77 ln 3-7) These instructions were in response to an email sent to her on that same day with the "vacation plan as requested." Certainly the evidence showed that Ms. Guilliani's testimony was unreliable. In addition, this evidence supports the ALJ's finding that the Employer was forcing employees to go on vacation as testified by Mr. Grant. Ms. Guilliani's email specifically instructed that vacations had to be contemplated before September 30, and not all employees were in compliance with the instructions. This evidence further supports Mr. Grant's allegations that Ms. Guilliani was giving instructions to employees that they had to exhaust their vacations by September 2011. (GC Exhibit 2) Although she denied on the record having any knowledge about this matter or imparting such instructions, the documentary evidence proves otherwise.

Evidently the emails from Ms. Lopez and Ms. Guilliani, respectively, in addition to Mr. Paoli's disciplinary action support Mr. Grant's testimony and ultimately the ALJ's finding that the Employer forced employees to take vacations at time they did not want to take vacations. Although Employer's officials denied on the record forcing its employees to taking their vacations the documentary evidence proved otherwise.

The evidence previously discussed demonstrated that between February and August 2011, Mr. Grant sent Respondent four letters and held two meetings with Respondent's representatives to discuss the employees' complaints about being forced by Respondent to take vacations at times they had not elected to take them. The documentary evidence submitted and the uncontroverted testimony of the March 8th

meeting supports Mr. Grant's testimony and it is evidence that bears directly on his credibility that unit employees were complaining that Respondent was forcing them to take vacations.

IV. CONCLUSION

For the reasons previously discussed, Acting General Counsel takes the position that the ALJ correctly credited Mr. Grant as a witness.

WHEREFORE, Counsel for Acting General Counsel respectfully requests that the instant Answering Brief be duly considered, the Respondent's Exceptions denied, and the Administrative Law Judge Decision be affirmed.

Dated at San Juan, Puerto Rico this 16th day of October, 2012

Ayesha K. Villegas Estrada

Counsel for Acting General Counsel National Labor Relations Board, Region 24

La Torre de Plaza, Suite 1002 525 F.D. Roosevelt Ave. San Juan, P.R. 00918-1002 Telephone (787) 766-5347 ayesha.villegas-estrada@nlrb.gov

TABLE OF AUTHORITIES

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<u>NLRB v Katz</u> , 369 US 736 at 743 (1962)	10
<u>Robbins Door & Sash Co.</u> , 260 NLRB 659 (1982)	10
Waxie Sanitary Supply, 337 NLRB 303 (2001)	10

CERTIFICATE OF SERVICE

I hereby certify that the "Acting General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge Decision" has been served by e-mail to: Carlos E. George at carlos.george@oneillborges.com; Alberto Bayouth at alberto.bayouth@oneillborges.com; and Harold Hopkins at snikpohh@yahoo.com.

Dated at San Juan, Puerto Rico this 16th day of October 2012.

Ayesha K. Villegas Estrada

Counsel for Acting General Counsel